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CITATIONS

774-058—65

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 992

PHILIP R. CONSOLO, PETITIONER

v.

FEDERAL MARITIME COMMISSION, UNITED STATES OF AMERICA, AND FLOTA MERCANTE GRANCOLOMBIANA, S.A.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL MARITIME COMMISSION AND THE UNITED STATES

STATEMENT

Petitioner, Philip R. Consolo, is engaged in the business of purchasing bananas in Ecuador and selling them in the United States (Pet. App. 22a). Flota Mercante Grancolombiana, S.A. ("Flota") is a steamship company transporting bananas in refrigerated cargo ships from ports on the west coast of South America, including Ecuador, to various ports in the United States (Pet. App. 27a–28a).

Flota had transported bananas since 1950 under special contracts giving the contracting shipper the exclusive use for a period of time of its refrigerated

("reefer") cargo space (Pet. App. 23a). In August of 1957, however, the Maritime Commission ruled that the Grace Line, which offered a reefer service generally similar to that of Flota, was a common carrier of bananas under the Shipping Act and must offer refrigerated space to all qualified banana shippers on an equal basis (Pet. App. 23a). Shortly after the Commission's initial ruling to that effect, Consolo made a written demand on Flota for a fair share of Flota's refrigerated space (*ibid.*).

Since Flota, in accordance with its previous practice and the custom in the industry, had just signed an exclusive contract with another shipper (Panama Ecuador) covering all its reefer space from Ecuador for a period of three years (Pet. App. 10a–11a, 36a), it refused the demand (Pet. App. 23a), but almost immediately (on October 30, 1957) filed a petition with the Commission seeking a declaratory order determining whether it was required to cancel existing contracts for banana shipments (*ibid.*). On November 15, 1957, Consolo filed its complaint pursuant to Section 22 of the Shipping Act (46 U.S.C. 821), alleging that Flota had discriminated against him in the allocation of reefer space and seeking reparations in the amount of $600,000 resulting from the loss of unrealized profits (Pet. App. 22a, 23a, 39a). The two proceedings were consolidated for hearing (Pet. App. 23a). Almost two years later, the Commission, by order dated June 22, 1959 (Pet. App. 22a), ruled that Flota was a common carrier within the meaning of the Shipping Act and had violated Sections 14 and 16 of the Act (46 U.S.C. 813, 815), by refusing to

allocate space to Consolo (Pet. App. 22a, 23a). Finally, at a proceeding commenced after the decision in 1959 as to Flota's liability, evidence concerning Consolo's damages was taken and on March 28, 1961, the Commission entered a Report and Order directing Flota to pay Consolo $143,370.98 in reparations.

On May 23, 1961, Consolo filed a petition for review in the court of appeals, challenging the Commission's award of reparations as inadequate (Pet. App. 22a). On May 24, 1961, Flota filed a petition in the same court, claiming that Consolo was not entitled to any reparations.[1]

Consolo filed a motion to dismiss Flota's petition on the ground that the court of appeals had no jurisdiction under the Hobbs Act (5 U.S.C. 1031, *et seq.*) to review orders awarding reparations on petition of the party charged (Pet. App. 30a)[2]; it argued that Flota could obtain review of such an order only by

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[1] Flota had previously filed a petition for review challenging the Commission's determination of June 22, 1959, that it was a common carrier of bananas and had discriminated against Consolo in the allocation of cargo space in violation of Sections 14 and 16 of the Shipping Act (Pet. App. 22a). The issues raised by this petition were held in abeyance pending the outcome of *Grace Line, Inc.* v. *Federal Maritime Board*, 280 F. 2d 790 (C.A. 2), certiorari denied, 364 U.S. 933, a similar case (*id.*, n. 2). These issues as well as those raised by the 1961 petitions were heard together below and decided in one opinion (Pet. App. 20a–37a).

[2] No challenge was made to the court's jurisdiction to review Consolo's petition challenging the Commission's reparations award as inadequate. Nor was any challenge made to the court's jurisdiction to entertain Flota's petition seeking review of the Commission's 1959 determination of liability.

refusing to pay the award and defending the refusal in a suit to collect on the award brought by the shipper in the district court pursuant to Section 30 of the Shipping Act (46 U.S.C. 829). The court denied the motion, stating that, regardless of the practice under the Interstate Commerce Act (Pet. App. 30a–31a), the language and legislative history of the Hobbs Act indicated that Congress intended "to clarify and simplify the review situation as much as possible, rather than to perpetuate distinctions between awards, denial of awards, and other Federal Maritime Board actions, unless such distinctions are inevitable" (Pet. App. 32a). It ruled that no such distinction was inevitable in the present case. Moreover, since Consolo's petition challenging the adequacy of the award was clearly reviewable in the court of appeals, the court held (Pet. App. 31a): "Once here, the order should be reviewable in its entirety, and the rights of all parties considered [citation omitted]."

On the merits, the court affirmed the ruling of the Commission that Flota had violated the Shipping Act by refusing to allocate space to Consolo (Pet. App. 27a–30a). It held, however, that in view of the unsettled nature of the law concerning the status of such carriers as Flota and the latter's prompt attempt to obtain a determination of the lawfulness of its existing contracts, the Commission failed to give adequate consideration to the question whether, notwithstanding the violation, it was inequitable in the circumstances to require reparations (Pet. App. 36a–37a). Noting that the Commission may have erroneously believed that it was *required* to grant repara-

tions once it found a violation of the Act, the court remanded the case to the Commission for consideration of the issue "whether, under all the circumstances, it is inequitable to force Flota to pay reparations * * *" (Pet. App. 37a).

After further consideration on remand, the Commission determined (Pet. App. 59a–67a) that the law concerning the status of such carriers as Flota and its contracts was not unsettled at the time in question and that under this and all the other circumstances of the case it could not agree that Flota had acted in good faith so as to make it unfair or inequitable to assess damages against it. The Commission ruled, however, that the original reparation figure of $143,370.98 had been improperly calculated (Pet. App. 67a–69a) and that the actual damages resulting from lost profits due Consolo amounted to $106,001.00 (Pet. App. 69a). A final order (Pet. App. 70a–71a) directing Flota to pay Consolo reparations in that amount was entered on September 16, 1963. Both parties again petitioned for review.

The court of appeals reversed (Pet. App. 6a–19a). It noted (Pet. App. 9a) that, notwithstanding the court's prior conclusion to the contrary, the Commission on remand asserted that the law was *not* unsettled in 1957 when Flota filed its petition for a declaratory order concerning the status of its contracts. It noted further (*id.*, 17a) that Flota was being made to pay for the Commission's own delay in rendering a declaratory order. Reviewing the circumstances concerning the "reasonableness of Flota's behavior in

1957" (Pet. App. 11a), the court concluded (Pet. App. 9a):

> The Commission's opinion, presently under review, suggested that Flota had not acted in good faith and concluded that substantial equities in its favor were lacking. A careful examination of that opinion, the evidence relied on by the Commission and the other evidence in the case constrains us to hold that the Commission's determination ignores not only the guideposts of our original decision but also the substantial weight of the evidence before it.

Final judgment (Pet. App. 72a) was entered directing the Commission to vacate the reparation order issued on September 16, 1963.

DISCUSSION

Petitioner asks this Court to grant review of both jurisdictional and substantive questions concerning the reparation provisions of the Shipping Act of 1916 which arise out of the prolonged course of the present litigation. The government did not seek review of the decision below, because it believed that the court's disposition of the jurisdictional question was correct—although for a reason far narrower than that adopted by the court below—and that the substantive questions did not merit further review. We do not, however, oppose the grant of certiorari, limited to the jurisdictional question presented. That issue—involving the jurisdiction of courts of appeals to review reparation orders of the Maritime Commission—is of substantial importance, and is, moreover, as petitioner contends, closely related to the question presented in No. 606,

1. Petitioner contends that the present case raises, under the Shipping Act, the same question as to jurisdiction to review reparation orders as is already before the Court under the Interstate Commerce Act in *Interstate Commerce Commission* v. *Atlantic Coast Line R. Co., et al.* (No. 606, this Term). Thus, Section 30 of the Shipping Act (46 U.S.C. 829), like Section 16(2) of the Interstate Commerce Act (49 U.S.C. 16(2)), permits a shipper to bring suit in the district court to collect on a reparation award if the carrier refuses to pay it, and affords the shipper certain advantages such as choice of venue, freedom from costs, and the right to attorneys' fees if successful. Petitioner notes that the ruling of the court below—sustaining direct appellate review of a Commission reparation award on the petition of a carrier—will largely deprive injured shippers of these benefits, the very result the Interstate Commerce Commission and the United States are attempting to avoid in No. 606.

In the proceedings before the court of appeals in the present case, the United States and the Federal Maritime Commission argued that the language and legislative history of the statutes governing review of Maritime reparation orders, in particular the Hobbs Act (5 U.S.C. 1032), required a different result from that contended for in the *Atlantic Coast Line* case. On further consideration, however, we have reached the conclusion that the review provisions governing reparation orders of the Federal Maritime Commission and the Interstate Commerce Commission are fundamentally alike, as petitioner contends, and that

for reasons very similar to those we have urged in No. 606, this Term, the courts of appeals do not in general have jurisdiction to review, on a carrier's petition, reparation orders of the Federal Maritime Commission.

Section 30 of the Shipping Act of 1916 provides the means by which a shipper may obtain enforcement of a Federal Maritime Commission reparation order by suing for damages in a trial court; it corresponds closely, as we have noted, to Section 16(2) of the Interstate Commerce Act. For reasons identical to those we have set forth in our brief in the *Atlantic Coast Line* case, we believe that Congress also intended Section 30 to be the means by which carriers could obtain review of Commission reparation orders—by setting forth their contentions as defenses in a shipper's suit for enforcement of the order. Carriers were not to bring separate proceedings for review under Section 31 of the Shipping Act, a provision which is by its terms applicable only if Section 30 is not.[3] In 1950, the Hobbs Act substituted review in the court of appeals for review "pursuant to the provisions of Section 31, Shipping Act, 1916, as amended". 64 Stat. 1129, 5 U.S.C. 1032. But review of reparation orders at a carrier's request, which had never been under Section 31 of the Shipping Act, remained in the district courts in enforcement pro-

[3] Section 31 of the Shipping Act corresponds closely to 28 U.S.C. 1336 and 1398, provisions for review of Interstate Commerce orders which, we have argued in the *Atlantic Coast Line* case, do not authorize review of a reparation order at the suit of a carrier.

ceedings under Section 30 of the Act. Nothing in the legislative history suggests a contrary conclusion. In short, we believe that a carrier can in general obtain review of a reparation order only by defending against the enforcement proceeding brought by a shipper in a district court.

We did not petition for further review by this Court, however, because we think that the situation changes when the *shipper* first seeks review of the reparation order in the court of appeals. Here, petitioner first invoked the jurisdiction of the appellate court, asking for an increase in the amount of the award. In this circumstance, economy of judicial effort requires a full review of the questions of reparations in the court of appeals, rather than piecemeal litigation with some issues (the propriety of an increase in the amount awarded) decided by the court of appeals and other issues (the propriety of a denial of all reparations or a reduction in the amount awarded) decided by the district court. In short, if the shipper calls upon the court of appeals to increase the amount of reparations granted by the Federal Maritime Commission, it cannot object to the same tribunal reviewing the propriety of the reparations in fact awarded.

In sum, although we believe that jurisdiction was properly assumed on the particular facts of this case, we do not oppose the grant of certiorari with respect to the jurisdictional question because the opinion below is not limited to the facts of this case, and because even the narrow issue presented by the case is not without substantial difficulty and some importance.

2. We do not believe that further review of the other questions presented by the petition is necessary at the present time.

(a) In its first opinion, the court below remanded the case to the Commission for consideration of the question "whether, under all the circumstances, it is inequitable to force Flota to pay reparations" (Pet. App. 37a). The court found that the Commission might have erroneously believed that it was *required* to grant reparations once it found a violation of the Act, whereas the pertinent language of Section 22 of the Act (46 U.S.C. 821) provides merely that reparations "may" be directed in such a case. On remand (Pet. App. 59a), the Commission noted its agreement that the award of reparations is not mandatory. Petitioner contends (Pet. 10–11) that these rulings inject a new standard into Section 22 and that a shipper, in addition to proving the violation and his damages, now must also prove that the payment of reparations would be "equitable."

The rulings below merely recognize that, under Section 22, the direction to pay reparations is discretionary with the Commission. The statute's careful use of the permissive word "may" reflects an intent that the administrative agency, which is expert in the problems of the industry, not be compelled automatically to grant reparations following a violation of the Act, without regard to circumstances militating against such award. While it may be assumed that in a great majority of cases where carriers have violated the act they should be compelled to pay damages to shippers injured by the violation, the Commission

should not be foreclosed from exercising discretion in this area in appropriate cases. The Interstate Commerce Commission exercises a very similar discretion when it finds that a rate or practice is unreasonable as to the future but not as to the past, and accordingly forbids the practice but denies reparations. We believe that there is no difference in substance between that firmly established mode of procedure and the differently worded procedure adopted by the Federal Martime Commission and the court of appeals in the present case.

Moreover, the existence of such discretion on the part of the agency does not increase the burden on the complaining party. Proof of the violation and his damages makes out a *prima facie* case for the complainant; the burden is then on the carrier to persuade the Commission that special circumstances nevertheless warrant a refusal to direct payment of reparations. The court of appeals held that the carrier had sustained its heavy burden of establishing that such special circumstances existed in the present case, but the problem is unlikely to arise in any significant number of cases.

(b) Finally, petitioner urges (Pet. 12–14) that, in holding that the cumulative weight of all the circumstances rendered it inequitable to require reparations, the court below made its own findings of fact and substituted its own judgment as to the weight of the evidence for that of the Commission. We believe there is merit to this contention. Nevertheless, we do not believe that the issue calls for this Court's intervention.

The determination whether it is equitable to grant reparations in a particular case involves subtle considerations of a party's good faith and the reasonableness of his conduct under the circumstances in the the industry. Different inferences may be drawn from the same evidence and this is precisely the type of determination as to which the judgment of the Commission is entitled to great weight. If that judgment is rational and has an adequate basis in the record, it should not be disturbed even if the reviewing court, had it been the trier of facts, would have reached a different result. See, *e.g., Securities and Exchange Commission* v. *Chenery Corp.,* 332 U.S. 194.

In the circumstances of the present case, however, the reviewing court's redetermination of the equities did not involve a flagrant disregard of the limitations of review. Its decision was inextricably intertwined with its conclusion as to the unsettled nature of the law at the time of Flota's violation; it believed that the Commission erred in ruling that there could have been no confusion as to the guiding rules. On this purely legal issue, the Commission's determination was entitled to less deference than on other matters. The instant case therefore does not present the "rare instance" calling for this Court's intervention to correct a gross misapplication of the standard governing review of agency findings. *Federal Trade Commission* v. *Standard Oil Co.,* 355 U.S. 396, 401; *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 490–491.

CONCLUSION

For the foregoing reasons we do not oppose the granting of a writ of certiorari limited to Question 1 of the Petition.

Respectfully submitted,

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